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In the
Supreme Court of the United States.

OCTOBER TERM, 1985

THE UNITED STATES OF AMERICA,
RESPONDENT,

v.

JOHN DEMJANJUK,
PETITIONER.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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Buffalo, New York 14203,
Counsel of Record,
JOHN J. GILL AND
DAVID C. EISLER,
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Cleveland, Ohio 44114.

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Issue Presented

Whether the Government misused the doctrine of collateral estoppel in its prosecution of its deportation case against petitioner, thereby depriving him of his rights to due process.

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Title v. INS, 322 F.2d 21 (9th Cir, 1963)

Federal Regulations:

8 Code of Federal Regulations § 287.6

Parties to the Proceedings

1) The United States of America,
by the Immigration and Naturalization Service
per: Russell A. Ezolt
Chief Legal Officer
Cleveland, Ohio 44199

by the Office of Special Investigations
per: Bruce J. Einhorn and Michael Wolf
Trial Attorneys
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Respondent

2) John Demjanjuk
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Seven Hills, Ohio 44131
per: Mark J. O'Connor, Esq.,
John J. Gill, Esq., and
David C. Eisler, Esq.,
Attorneys for Petitioner

Opinions Below

The cases dealing with the deportation action alone are as follows:

In the Matter of John Demjanjuk, AR
237 417 (Immigration Judge Adolph Angellili,
May 23, 1984),

In the Matter of John Demjanjuk, AR
237 417 (Board of Immigration Appeals,
February 14, 1985);

United States of America v. John Demjanjuk
C.A. No. 85-3198, Sixth Circuit Court of Appeals,
June 28, 1985, rehearing denied August 26, 1985.

These opinions are reproduced in full in the appendix.

Grounds for Supreme Court Jurisdiction

Jurisdiction of the United States Supreme Court is invoked under the following facts: the United States Sixth Circuit Board of Appeals affirmed the Board of Immigration Appeals decision that petitioner was deportable under 8 § 1251 (a) (1), (2) and (19). Appeal to the United States Sixth Circuit was taken pursuant 8 United States Code § 1105. The decision was rendered on June 28, 1985, rehearing denied on August 26, 1985. The Sixth Circuit recalled and stayed its Mandate, on petitioner's motion, on September 18, 1985. This petition is filed within 90 days of the denial of petitioner's motion for rehearing. This Court's particular jurisdiction to review the Sixth Circuit Court of Appeals' decision is conferred by 28 U.S.C. § 1254(1), which allows for review of Federal "cases in the courts of appeal."

Statutes and Federal Regulations Involved

8 U.S.C. § 1251 (a), (1), (2), (19):

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who —

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;

* * * *

(19) during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with —

(A) The Nazi government of Germany,

(B) any government in any area occupied by the military forces of the Nazi government of Germany,

(C) any government established with the assistance or cooperation of the Nazi government of Germany, or

(D) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

8 CFR § 287.6:

In any proceeding under this chapter, an official record or an entry therein, when admissible for any purpose, may be evidence by an official publication thereof or by a copy attested by the official having legal custody of the record by his deputy. If the office in which the record is kept is in foreign territory, the copy shall be attested by a person authorized to make the attestation and the attested copy shall be accompanied by a certification by any officer in the Foreign Service of the United States stationed in the foreign country where the record is kept as to the genuineness of the signature and official position of the attesting officer or any foreign official whose certification of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation.

Statement of the Case

— A —

Prelude: Denaturalization

In its case in chief to denaturalize petitioner, the Office of Special Investigation (OSI) introduced Soviet certified photographs of what has come to be known as the "Trawniki Identification Card" (Government Exhibits 5 and 6). These photographs had first appeared in partial form in the Soviet controlled English-language newspaper "*Soviet Way*" during October, 1977 (see Appendix). These photographs of the Trawniki Identification Card were the centerpiece of the OSI – Soviet co-prosecution of the petitioner, John Demjanjuk. It was also the first time that the OSI was entrusted with Soviet State prosecutor's evidence against a United States citizen. The Soviets, meanwhile, announced that no piece of Soviet envidence had ever been discredited or found fraudulent by a United States Court. Both the foreign policy consequences, of such a discreditation, as well as the jeopardy in which OSI's continued capacity to prosecute United States citizens based on Soviet supplied evidence were obvious.

Gideon Epstein, OSI's document expert, testified at first that the Soviet Trawniki Identification Card photographs were unaltered, as the Soviet government had certified (see Appendix). Deep into the trial the original Card was transported without notice into the District Court by a Soviet Embassy employee. Gideon Epstein, recalled to the stand, testified that this key Soviet evidence, Government's Exhibits 5 and 6, had been materially altered, thereby contradicting his prior testimony (see Appendix). New photographic copies of the Card taken by Mr. Epstein at the Soviet Embassy [Government Exhibits 5(b) and 6(b)] (see Appendix) were submitted to cover the Soviet fraud of which Mr. Epstein testified he had been fully aware prior to trial.

Jodi Leach was then called by OSI to translate the Russian appearing on the blocked-out portion of the Card. Ms. Leach, left unqualified as an expert at trial, testified upon her examination of the Card made the night prior to her District Court appearance. The blocked-out portion of the Card bore clear indicia that the Soviet Committee for State Security, or KGB, had a more than

casual role in the preparation of the Trawniki Identification Card. This blocked-out portion did not appear in the "*Soviet Way*" illustration in 1977.

The original Trawniki Identification Card was marked "Original' 5 and 6," and taken back to the Soviet Embassy the same day. Then defense counsel John Martin was given that Saturday and Sunday to locate a document expert to forensically examine the Card in Washington, D.C.

Meanwhile, OSI pursued its case with testimony of two (2) former S.S. members and five Treblinka survivors. The Soviet charges of anti-Soviet Vlassov army service and Nazi collaboration at the Sobibor camp evaporated. In their place, the single charge, arising from the survivor testimony, that the "Trawniki Identification Card" photograph resembled "Ivan Grozny," Treblinka's high executioner of 900,000 victims materialized. A visa photograph taken almost a decade after the atrocities of which petitioner was charged was also identified by the survivors from a photo spread album made up by the Israeli police (see Appendix). Judge Battisti brushed aside the suggestiveness of the Israeli albums, and all of the defendant's rebuttal and exculpatory evidence.

Judge Battisti sealed petitioner's status in his discrete denaturalization decision, revoking petitioner's citizenship. Judge Battisti found that petitioner had concealed the Trawniki and Treblinka S.S. guard service, thereby rendering him excludable under the *Fedorenko* rule, 449 U.S. 490 (1981). The Vlassov service charges, brought by the Soviets, were not ruled upon by the Court, see *United States v. Demjanjuk*, 518 F.Supp. 1362, 1363 (N.D. Ohio, E.D., 1981).

— B —

Deportation

When petitioner's case reached Immigration ALJ Adolph Angellili, OSI was again ready to advocate the Soviet charges of Vlassov service and relitigate the denaturalization to identify petitioner as Ivan Grozny, which allegation was contradicted by the Soviet allegations and the Trawniki Identification Card evidence.

Offering the entire denaturalization trial record separately, OSI plead to the Immigration Court that an expansion of the fact-finding of the District Court was within its power. Critically of-

fering the transcript and exhibits in the denaturalization trial, OSI later offered supplementary "rebuttal" evidence. In furtherance of its end, OSI plead that collateral estoppel foreclosed petitioner challenging in any way, or on any basis, the re-introduced denaturalization record.

As public media pressure mounted to choke off the deportation proceedings quickly, ALJ Angellili granted new counsel time to develop an extensive testimonial and documentary case rebutting OSI and exonerating petitioner. ALJ Angellili gave the new defense team notice, however, that their proof of fraud, especially Soviet fraud, and of OSI's misconduct in concealing that fraud, would have to be plead before the District Court that heard the original denaturalization.

The Soviet "Trawniki Identification Card" (Government's Exhibits 5 and 6) was found in the basement of the District Court, where it had been squirrelled away by OSI prior to the deportation hearing. Upon stipulation of the parties, the Soviet evidence was examined by two (2) independent document experts (see Appendix). Their testimony conclusively demonstrated that the Soviet documentary evidence was a fraud. The conclusions of the two experts, Edna Robertson and Fabian Tasson, was reinforced by Rudolph Reiss, who, as the non-commissioned administrative officer at Trawniki, testified that the likes of the "Trawniki Identification Card" was never used at the camp he administered.

As the Soviet co-prosecutorial fraud became plain in the deportation proceedings, petitioner filed his first Motion to Vacate in 1981 denaturalization with Judge Battisti on October 23, 1983. Taking his cue from ALJ Angellili, that motion contained clear evidence of fraud, including recantations by Heinrich Schaefer and Otto Horn, two German witnesses in the denaturalization trial. Judge Battisti denied the motion, calling for more substantial evidence of fraud.

On November 17, 1983 the State of Israel requested the extradition of John Demjanjuk based solely upon the testimony of the five Israeli survivors given during the 1981 denaturalization trial. Judge Battisti took on the extradition, at once rebuffing defense motions calling for his recusal.

On May 23, 1984, ALJ Angellili rendered his decision in which he granted petitioner, *sua sponte*, voluntary departure from the

United States, based upon good moral character. Petitioner's failure to avail himself of that equitable relief would result in his deportation, based upon his "concession" of Ukranian Liberation Army service. Judge Battisti immediately frustrated the ALJ by refusing to lift the extradition bond.

On December 12, 1984, petitioner filed his Second Motion to Vacate the 1981 denaturalization decision. This Motion included the substantial evidence of Soviet co-prosecutorial fraud demanded by Judge Battisti. Appeal of ALJ Angellili's decision was made to the Board of Immigration Appeals. Judge Battisti had continued the extradition proceedings for a year.

On February 12, 1985, Judge Battisti denied the Second Motion to Vacate, and on February 14, 1985 the Board reversed ALJ Angellili's grant of voluntary departure, basing their decision on collateral estoppel, applying the *Fedorenko* rule that branded petitioner a Nazi collaborator, while not reaching the Vlassov Army service.

On June 28, 1985, OSI accomplished in the Sixth Circuit Court of Appeals what it had failed at the Board when the Circuit specifically found petitioner deportable not only on the basis of his alleged Trawniki and Treblinka service, but upon his membership in the Vlassov Army by *per curiam* opinion. Rehearing was denied on August 26, 1985.

Argument

The Government misused the doctrine of collateral estoppel in its prosecution of its deportation case againt petitioner, thereby depriving him of his rights to due process.

The petitioner in this case seeks review of the Government's invidious misuse of the doctrine of collateral estoppel. The Government not only sought to oust petitioner from our shores based on the tainted denaturalization decision, of which concurrent review is sought today, but on the basis of an expanded administrative fact-finding for which purpose they reintroduced the tainted record. Petitioner has been remonstrated for attempting a second bite of an apple on which his life depends, while the Government's blatent perversion of the collateral estoppel doctrine has been endorsed by every lower adjudicating body. These adjudicating bodies have endorsed the Government in its successful enterprise of turning the doctrine of collateral estoppel into a wire garrote used to choke off petitioner's exercise of his due process rights, by at once leaving him defenseless against its essential charge and taken by surprise as the Government twined together a gallows rope more to Moscow's liking.

The issue in this case is whether OSI misused the doctrine of collateral estoppel. Petitioner will demonstrate below how OSI misused this doctrine and in so doing denied petitioner his rights to due process. Petitioner will not here belabor his clear demonstration of Soviet co-prosecutorial fraud made out of his Motions to Vacate the 1981 denaturalization. Suffice to say that the testimony of documents experts Edna Robertson and Fabian Tasson, the exonoration testimony of three (3) survivors of Treblinka, the recantations of Schaefer and Horn and the admissions of KGB Major Kubanov, here appended, together demonstrate conclusively that a cruel and intentional misidentification has been foisted upon our judiciary. The judiciary had no political option but to swallow that fraud. All this is discussed in petitioner's concurrent pleading concerning his denaturalization filed today.

None of this fraud would have come to light, however, had it not been for OSI's invidious misuse of the collateral estoppel doctrine. For OSI wanted the Courts to eat the fraud and have it, too, by presenting at once Judge Battisti's denaturalization decision

as binding proof of petitioner's alienage and excludability, and reintroducing the denaturalization *record* to prove separately petitioner's membership in the Vlassov Army, an anti-Soviet military force made up, primarily, of Ukranians. Thus, OSI sought the benefits of offensive collateral estoppel and of a revivified record upon which it based its further calumny. Petitioner attacked the revivified record, exposing the Soviet co-prosecutorial fraud, but ALJ Angellili reserved judgment on OSI's motion for collateral estoppel (see Appendix). Thus, petitioner made out his defense with the possibility that it would be utterly negated with a flick of the ALJ's pen.

Collateral estoppel has been recognized as a useful but dangerous doctrine prone to abuse, *Title v. INS* 322 F.2d 21 (9th Cir, 1963), especially where due process may be sacrificed upon its invocation. *Title, supra,* succintly sets forth its dangers in the due process context. At issue in *Title* was whether he was a member of the Communist party. In his denaturalization trial, Title presented no evidence as to his associations; while in his deportation hearing, he sought to demonstrate that he was not a Communist. The Ninth Circuit said, citing *Bridges v. Wixon,* 326 U.S. 135 (1945), that:

> "Why he did not choose to present evidence in his denaturalization proceeding is not of concern to us now. What does concern us is that at his deportation proceeding he desired to present evidence and was refused the opportunity to do so," at 24.

The deportation was set aside. Here, the deportation must in like fashion be set aside for essentially the same reason: petitioner did not litigate the Trawniki Identification Card in any effective way in the denaturalization, but as it were "desired to present" evidence of its fraudulence in deportation. From the conduct of ALJ Angellili, it is clear that he awaited Judge Battisti's word before making his decision on collateral estoppel. The ALJ acted with deadly caution. *Title, supra,* makes it clear that when OSI sought the benefits of collateral estoppel and a revivified denaturalization record, he had the power to act on the record.

Moreover, the Regulations of the INS, specifically 8 CFR § 287.6 and the cases prompting its promulgation, *McNeil v. Kennedy*, 298F.2d 323 (DCC, 1962) and *Bridges v. Wixon*, 326 U.S. 135 (1945), all but demand that a purported government document pass the test of adversarial scrutiny. As recounted above, that scrutiny was effected only in the deportation proceedings. Had OSI presented only the 1981 judgment, at least petitioner's alienage might not have been a matter of dispute. Both OSI presented the entire record and in so doing opened up the entire case. It cannot have both benefits, that of a judgment by collateral estoppel and that of a judgment from a revivified denaturalization record. This conduct clearly offends due process, especially in light of its dire results:

> "That deportation is a penalty — at times a most serious one — cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that *liberty* not meet the essential standards of fairness." *Bridges v. Wixon, supra* at 154 (emphasis supplied).

Here, the record veritably screams that the procedure by which petitioner has been deprived of his liberty was far from meticulous.

When OSI sought the order by collateral estoppel, it gave up the opportunity to go on the denaturalization record. Yet, when it presented the record to the Immigration Court, it triggered petitioner's right to challenge the record. The denaturalization judgment's ultimate fact finding, to wit: that petitioner failed to disclose his Trawniki and Treblinka service were material misrepresentations rendering his citizenship 'illegally procured,' *United States v. Demjanjuk*, 518 F.Supp. 1362, 1381-82 (N.D. Ohio, E.D., 1981) did not render him deportable for all purposes. Assuming, *arguendo*, it did, the reintroduction of the denaturalization record before the ALJ gave petitioner a second bite of the apple to which he had a recognized and unalienable right, *Title, supra, Bridges, supra*. The application of collateral estoppel choked off that right.

The Board of Immigration Appeals recognized that OSI had committed a fatal blunder, so retreated to application of collateral estoppel. But by then it was too late, the revivified denaturalization record was already part of the deportation record. As in denaturalization, the Board turned its gaze from an unavoidable fact sitting

in ream boxes before it. Collateral estoppel could not be applied, since *The Evergreens v. Nunen*, 141 F.2d 927, 931 (2d Cir. 1944) holds that collateral estoppal is an all or nothing proposition. Here, OSI abused the doctrine by claimed collateral estoppel for some facts, but insisting on the right to prove others by revivified evidence.

The Sixth Circuit Court of Appeals demonstrated OSI's folly by affirming, per curiam, the necessary result of OSI's abuse: collateral estoppel on camp service, revivified evidence on Vlassov service. The Sixth Circuit, by swallowing the tangle, and in seeking to justify its act, exposed OSI's abuse. Due process and fundamental fairness demand that OSI's abuse of this doctrine be brought to heel. Our system cannot afford the luxury of justice for some, but not for all.

Conclusion

For the foregoing reasons, petitioner respectfully request that certiorari be granted by this Court.

Respectfully submitted,

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